CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

SACRAMENTO, CALIFORNIA

In re: Request for Regulatory Determination filed by N. C. Theel, concerning the Department of Industrial Relations, Division of Labor Standards Enforcement's "Interpretive Bulletin No. 86-3" ("Vacation Pay Under Suastez")[1]	1989 OAL Determination No. 18 [Docket No. 89-006] December 29, 1989 Determination Pursuant to Government Code Section 11347.5; Title 1, California Code of Regulations, Chapter 1, Article 2

Determination by:

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SYNOPSIS

The issue presented to the Office of Administrative Law is whether or not an interpretive bulletin issued by the Department of Industrial Relations, Division of Labor Standards Enforcement, which governs claims for vacation pay under California law, is a "regulation" required to be adopted in compliance with the Administrative Procedure Act.

The Office of Administrative Law has concluded that the interpretive bulletin is in part a "regulation" required to be adopted in compliance with the Administrative Procedure Act.

THE ISSUE PRESENTED [2]

The Office of Administrative Law ("OAL") has been requested[3] to determine[4] whether or not the Department of Industrial Relations, Division of Labor Standards Enforcement's ("DLSE") "Interpretative Bulletin No. 86-3" ("IB No. 86-3"), which governs claims for vacation pay under Labor Code section 227.3, as interpreted in Suastez v. Plastic Dress-Up Co.,[5] is a "regulation" required to be adopted pursuant to the Administrative Procedure Act ("APA").[6]

THE DECISION [7,8,9,10,11]

OAL finds that:

(1) rules issued by DLSE are generally required to be adopted pursuant to the APA;

(2) parts numbered five and eight and portions of parts numbered two, three, six and nine of DLSE's IB No. 83-3 fall within the meaning of a "regulation" as defined in Government Code section 11342, subdivision (b);

(3) the remaining portions of DLSE's IB No. 83-3 do not constitute a "regulation" as defined in Government Code section 11342, subdivision (b);

(4) the regulatory provisions of IB No. 86-3 are not exempt from the requirements of the APA; and

(5) therefore, parts numbered five and eight and portions of parts numbered two, three, six and nine of IB No. 86-3 violate Government Code section 11347.5, subdivision (a).

REASONS FOR DECISION

I. AGENCY; AUTHORITY; BACKGROUND

Agency

The Division of Labor Standards Enforcement (a division of the California Department of Industrial Relations) was created in 1976 by the enactment of Labor Code sections 82 and 83.[12] The California Labor Commissioner is Chief of the Division of Labor Standards and Enforcement ("DLSE").[13]

DLSE is responsible for enforcing various provisions of the California Labor Code, including those involving wages, hours, and working conditions.[14] It is also responsible for resolving various claims for wages and benefits.[15]

Authority [16]

Labor Code section 98.8 provides:

> "The Labor Commissioner shall promulgate all regulations and rules of practice and procedure necessary to carry out the provisions of this chapter [Chapter 4, 'DLSE,' sections 79-104]." [Emphasis added.]

Background

To facilitate better understanding of the issues presented in this determination, we set forth the following relevant statutes and undisputed facts.

Labor Code section 96 provides in part:

> "The Labor Commissioner and his or her deputies and representatives . . . shall, upon the filing of a claim therefor by an employee . . . with the Labor Commissioner, take assignments of:
>
> . . .
>
> (h) Claims for vacation pay, severance pay, or other compensation supplemental to a wage agreement.
>
> . . ."

[Emphasis added.]

Labor Code section 227.3 provides guidance as to how such claims may be resolved. It states:

> "Unless otherwise provided by a collective-bargaining agreement, whenever a contract of employment or employer policy provides for paid vacations, and an employee is terminated without having taken off his vested vacation time, all vested vacation shall be paid to him as wages at his final rate in accordance with such contract of employment or employer policy respecting eligibility or time served; provided, however, that an employment contract or employer policy shall not provide for forfeiture of vested vacation time upon termination. The Labor Commissioner or a designated representative, in the resolution of any dispute with regard to vested vacation time, shall apply the principles of equity and fairness." [Emphasis added.]

Section 227.3, as originally adopted in 1972 and thereafter amended, fails to define the term "vested vacation time." Consequently, prior to 1982, vacation policies which either (1) denied an employee any vacation credit unless the employee reached a specified anniversary or calendar date or (2) caused forfeiture of all earned vacation credit that was not used by a specified anniversary or calendar date were considered acceptable by the Labor Commissioner.[17]

In 1982, the California Supreme Court, in the case of Suastez v. Plastic Dress-up Company ("Suastez"),[18] addressed the issue of "when vacation time becomes 'vested' under section 227.3"[19] The Court found that:

> "Case law from this state and others, as well as principles of equity and justice, compel the conclusion that a proportionate right to a paid vacation 'vests' as the labor is rendered. Once vested, the right is protected from forfeiture by section 227.3. On termination of employment, therefore, the statute requires that an employee be paid in wages for a pro rata share of his vacation pay."[20] [Emphasis added.]

On September 30, 1982, DLSE issued "Policy and Procedure Memorandum 82-4" ("the enforcement policy"), which set out guidelines for administering employee claims in light of Suastez.[21]

Shortly thereafter, various trade associations brought an action to prevent DLSE from processing vacation pay claims pursuant to the enforcement policy (California Hosp. Ass'n v. Henning ("Henning I"))[22]. The associations' chief contention was that Labor Code section 227.3, as interpreted by Suastez (and thus DLSE's enforcement policy), was preempted by the federal Employee Retirement Income Security

Act of 1974 ("ERISA").[23],[24],[25] The federal district court ruled in favor of the trade associations and issued an injunction on October 12, 1983, prohibiting the Labor Commissioner from processing vacation pay claims under Labor Code section 227.3. That decision was appealed.

In California Hosp. Ass'n v. Henning ("Henning II"),[26] the Ninth Circuit Court of Appeals considered the issue of whether or not the ERISA exemption was applicable to "unfunded" vacation benefits--i.e., vacation benefits paid out of the general assets of the employer. The court held that such vacation benefits were not governed by ERISA.

The opinion in Henning II was subsequently modified (California Hosp. Ass'n v. Henning ("Henning III"))[27] to read:

> "We held that ERISA did not apply to unfunded plans and therefore reversed the district court. The plaintiffs argue that the district court had enjoined state regulation of funded as well as unfunded plans and thus we should have affirmed in part. The Commissioner responds that he conceded below that ERISA preempted state regulation of funded plans, and the only issue contested and decided in the district court was whether state regulation of unfunded plans was similarly preempted. He contends that only this issue was appealed and therefore the reversal was complete.
>
> ". . .
>
> "Although it is clear that the only issue submitted to and considered by this court was the application of ERISA to unfunded programs, we are unable to determine on the record before us whether the application of ERISA to funded programs was litigated and decided below. . . . We therefore remand to the district court for a determination of whether the application of ERISA to funded programs was an issue litigated below on which the plaintiffs prevailed . . . ." [Emphasis added.][28]

On remand from the appellate court, the district court found that:

> ". . . the issue of ERISA's application to funded vacation programs was expressly raised, litigated and decided by the Court in connection with the parties' cross-motions for summary judgment, and that [the trade associations] prevailed on this issue."[29]

By order of the court, filed on February 9, 1987 and entered on February 10, 1987, the court declared that any unfunded vacation pay policy that provides vacation pay from an

employer's general assets falls outside the coverage of ERISA and that Suastez, Labor Code section 227.3 and DLSE's Policy and Procedure Memo 82-4, as modified, are not preempted and/or superseded by ERISA insofar as they relate to these unfunded policies. Conversely, the court also declared that any funded vacation plan or program, other than an employee benefit plan specified in Section 4(b) of ERISA,[30] which is maintained by an employer engaged in activities affecting interstate commerce, is an employee welfare plan subject to ERISA and that Suastez, Labor Code section 227.3 and DLSE's Memo 82-4 are preempted and superseded by ERISA insofar as they relate to such vacation plans or programs. As DLSE represented that it did not intend to enforce state laws against, or assert jurisdiction over, funded vacation programs, the court concluded that it was unnecessary to continue the permanent injunction against DLSE and thus declared the injunction dissolved as of September 8, 1986 (the date of the hearing on remand).

On September 30, 1986, DLSE issued "Interpretative Bulletin No. 86-3" ("IB No. 86-3" or "the challenged rule") on the subject of "Vacation Pay Under Suastez." (Attached herein as "Appendix A") IB No. 86-3 states in part:

> "With the lifting of the injunction in California Hospital Association v. Henning, employees throughout the state may once again file claims with the Labor Commissioner for enforcement of Labor Code Section 227.3 as interpreted in Suastez v. Plastic Dress-Up Co., 31 Cal. 3d. 774 (1982), for vacation payments which are paid from the employer's general assets. Many employers are designing vacation plans to comply with the decision and a number of questions have arisen concerning the Division's interpretation and application of Suastez. The following policies will provide guidance on the questions that have most frequently been posed and are effective immediately.
>
> "1. DLSE will accept only those claims for vacation pay which would be paid out of the employer's general assets. Claims for vacation pay filed against a third party such as a 'benefit association' or 'trust' or 'fund' have not heretofore been processed because such entities have customarily been part of a collective bargaining agreement. Papers filed in California Hospital suggest that there may be vacation pay arrangements which are paid neither from general assets nor pursuant to collective bargaining agreements. Any claim involving such a plan, fund, or program created in accordance with and subject to the provisions of ERISA must be pursued through state or federal courts. If an employer opposes a vacation pay claim by alleging ERISA

> coverage on any of the above grounds, enforcement as to that claim will be stayed for a reasonable period to allow the employer to submit evidence in substantiation of that defense."

On March 16, 1989, N. C. Theel submitted to OAL a Request for Determination "of Interpretative Bulletin No. 86-3."

II. ISSUES

Before turning to the dispositive issues of this Determination, we briefly address DLSE's contention that the Request for Determination was limited to the first numbered paragraph of IB No. 86-3, which relates to the types of vacation pay claims which may be reviewed by DLSE.

The submitted Request for Determination stated in part:

> "A request for determination of Interpretative Bulletin No. 86-3 issued and enforced, by the State Division of Labor Standards Enforcement is made to your office under [Title 1, California Code of Regulations] Section 122.
>
> "A copy of the Bulletin and "Cause of Action" no. 1, Tort Claim No. G225711 (rejected by the State Board of Control), which provides information and evidence supporting my request is attached. [Emphasis added.]

We note that the attachment to the Request, headed "Jonathan M. Theel . . . Tort Claim No. G225711 (apparently a part of a lengthier document) pertains solely to the ERISA issue, stating that the Commissioner improperly denied the Theel Claim on the basis that the employer claimed to have a vacation pay plan under ERISA. While this attachment implies that the Requester may have intended that OAL review only a specific portion of IB No. 86-3--i.e., the first numbered paragraph, there is no such limiting language in the Request itself.

In order to avoid an unintended expansion of the Request for Determination, OAL wrote to the Requester on October 18, 1989 to ask that he clarify whether he had intended that OAL review "(1) only numbered paragraph one of Interpretive Bulletin 86-3 or (2) the entire Bulletin."

By letter dated October 24, 1989, the Requester replied by stating:

> "In answer to your letter of October 18th relating to Docket No. 89-006, I request OAL to review the entire Bulletin (DLSE Interpretive Bulletin No. 86-3) for Regulatory Determination, as I had previously asked in

my letters dated March 16, 1989 to your office and the State Labor Commissioner." [Emphasis added.]

Accordingly, there can be no doubt that the Request for Determination covers the whole of IB No. 86-3. OAL is therefore obligated to render a Determination on the entire bulletin.

We now proceed with our Determination by turning to the three main issues before us:[31]

(1) WHETHER THE APA IS GENERALLY APPLICABLE TO DLSE'S QUASI-LEGISLATIVE ENACTMENTS.

(2) WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

(3) WHETHER THE CHALLENGED RULE FALLS WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE APA IS GENERALLY APPLICABLE TO DLSE'S QUASI-LEGISLATIVE ENACTMENTS.

Labor Code section 55 authorizes the director of the Department of Industrial Relations ("Department") to make rules and regulations in accordance to the APA. Section 55 provides in part that:

> ". . . Notwithstanding any provision in this code to the contrary, the director may require any division in the department to assist in the enforcement of any or all laws within the jurisdiction of the department. . . [T]he director may, in accordance with the [APA], make such rules and regulations as are reasonably necessary to carry out the provisions of this chapter [sections 50-64] and to effectuate its purposes." [Emphasis added.]

Labor Code section 56 provides:

> "The work of the department shall be divided into at least six divisions [one is] known as . . . the Division of Labor Standards Enforcement, ..." [Emphasis added.]

Labor Code section 59 provides:

> "The department through its appropriate officers shall administer and enforce all laws imposing any duty, power, or function upon the offices or officers of the department." [Emphasis added.]

Labor Code section 96 provides in part:

> "The Labor Commissioner and his or her deputies and representatives . . . shall, upon the filing of a claim therefor by an employee . . . with the Labor Commissioner, take assignments of:
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> . . .
>
> (h) Claims for vacation pay, severance pay, or other compensation supplemental to a wage agreement.
>
> . . ."
>
> [Emphasis added.]

Labor Code section 98.8 provides:

> "The Labor Commissioner shall promulgate all regulations and rules of practice and procedure necessary to carry out the provisions of this chapter [Chapter 4, 'DLSE,' sections 79-104]." [Emphasis added.]

Although Labor Code section 98.8 authorizes the Labor Commissioner to promulgate rules and regulations without specific reference to the requirements of the APA, the other quoted sections imply that rulemaking requirements of the APA are also applicable to the DLSE.

In addition, the APA applies to all state agencies, except those in the "judicial or legislative departments."[32] Since the Department of Industrial Relations (that is, DLSE) is in neither the judicial nor legislative branch of state government, we conclude that APA rulemaking requirements generally apply to that agency.[33]

Moreover, DLSE has previously conceded that regulations promulgated by the Labor Commissioner are subject to the requirements of the APA.[34]

SECOND, WE INQUIRE WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In part, Government Code section 11342, subdivision (b), defines "regulation" as:

> ". . . every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law

enforced or administered by it, or to govern its procedure, . . ." [Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

> "(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA] . . . ." [Emphasis added.]

Applying the definition of "regulation" found in Government Code section 11342, subdivision (b), involves a two-part inquiry:

First, is the challenged rule either

- a rule or standard of general application or
- a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either

- implement, interpret, or make specific the law enforced or administered by the agency or
- govern the agency's procedure?

The answer to the first part of the inquiry is "yes." For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.[35] IB No. 86-3 states DLSE's policy with respect to how vacation pay claims are to be treated under Labor Code section 227.3 following Suastez and Henning II. The application of IB No. 86-3 is not limited to specifically named individuals or to any specific fact situation. Rather, IB No. 86-3 is generally applied to all vacation pay claims.

The answer to the second part of the inquiry varies depending on the part of IB No. 86-3 being reviewed.

IB No. 86-3 consists of an introduction (previously quoted on page 610), ten separately numbered parts (focusing on different aspects of handling vacation pay claims), and a closing paragraph. (See Appendix A) As indicated by the introductory and closing paragraphs of IB No. 86-3, the ten enumerated parts are intended to serve as guidelines for DLSE deputies in reviewing claims for vacation pay.

While several of the numbered parts in IB No 86-3, implement, interpret or make specific the law enforced or administered by DLSE (and are thus regulatory), it is clear that other parts merely restate existing law.

We have previously stated that:

> "If a rule simply applies an existing constitutional, statutory or regulatory requirement that has only one legally tenable 'interpretation,' that rule is not quasi legislative in nature - no new 'law' is created."[36]

In other words, a restatement of the law does not constitute a "regulation."

Part Number One

As indicated in our discussion of the background of the present Determination, existing law precludes DLSE's handling of vacation pay claims under plans covered by ERISA. The first numbered part of IB No. 86-3 simply restates that law.

Part Number Two

The second numbered part pertains to the effect of Suastez on the statute of limitations and to the prospective application of that case. With respect to the issue of the statute of limitations, it appears that DLSE is stating the proper application of the law.

DLSE clearly considered the two-year statute of limitations period for oral contracts[37] and the four-year period for written contracts[38] in calculating the dates upon which claims under such contracts would be reviewed. In Suastez, it was recognized that an action brought under Labor Code section 227.3 (in which vacation time is provided by an employment contract or employer policy) first requires the exhaustion of administrative remedies--i.e., resolution of the claim by DLSE.[39] In essence, therefore, it appears that the injunction against DLSE's review of vacation pay claims

also acted against an action for breach of contract. Code of Civil Procedure section 356 provides:

> "When the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action."

With respect to the issue of the announced prospective applicability of Suastez--i.e., the last sentence of part number two--DLSE's policy to apply the proration principles of the case only to claims which arose following the decision is clearly an interpretation of law. The court in Suastez did not indicate that its holding should be given prospective effect only.

It is well recognized that:

> "'As a general rule, judicial decisions apply "retroactively." Indeed, a legal system based on precedent has a built-in presumption of retroactivity.'"[40]

We find that statements pertaining to the statute of limitations contained in part number two are not "regulations;" however, the last sentence of part two, pertaining to the prospective application of Suastez, is a "regulation."

Part Number Three

The first sentence of part number three provides that if a collective bargaining agreement contains vacation pay provisions, the agreement controls. This is nothing new. Labor Code section 227.3 begins with the words:

> "Unless otherwise provided by a collective-bargaining agreement, ..."

The statutory language implies that the provisions of collective-bargaining agreements control over section 227.3. The first sentence of section number three, therefore, simply restates the law.

However, the second sentence of part number three limits the types of claims that DLSE shall take. No such limitation is spelled out in Labor Code section 96, subdivision (h). Such an interpretation of that statute is not clear from a reading of the statute by itself or in conjunction with other statutes. In our view, the second sentence of part number three is an interpretation of law.

Part Number Four

The fourth numbered part relates to pro rata vacation pay under contract. Labor Code section 227.3 provides in part:

> ". . . whenever a contract of employment or employer policy provides for paid vacations, and an employee is terminated without having taken off his vested vacation time, all vested vacation shall be paid to him as wages at his final rate . . . ." [Emphasis added.]

We note that section 227.3 does not distinguish between full-time, part-time or temporary employees. Logic dictates, however, that employers should not be prohibited from having policies which provide different vacation benefits for the different types of employee groups. Where an employer agreement provides for vacation pay for all employees, it is undisputable that section 227.3 entitles all employees to payment for vested vacation time under the agreement. It is equally clear under section 227.3, however, that an employer agreement can provide for no vacation pay or for vacation pay for only a specific group of employees. Part number four does no more than restate the law.

Part Number Five

Part number five concerns waiting time penalties imposed pursuant to Labor Code section 203 for willful failure to pay wages. It states in part that "no waiting time penalties were accruing during the period the injunction was in effect." We find that statement to be an interpretation of law.

Labor Code section 203 ("Willful failure to pay discharged or quitting employees: . . . .") states:

> "If an employer willfully fails to pay, without abatement or reduction, . . . any wages of an employee who is discharged or who quits, the wages of such employee shall continue as a penalty from the date thereof at the same rate until paid or until an action therefor is commenced; . . .." [Emphasis added.]

In Triad Data Services, Inc. v. Jackson,[41] it was held that the filing of a claim or complaint with the Labor Commissioner does not constitute commencement of an action for purposes of section 203.[42] It follows, therefore, that an injunction against DLSE from proceeding on the claim does not stay an employee's waiting time penalty rights under section 203.[43]

Even assuming arguendo that existing law does permit the denial of waiting time penalties during the effective period of the injunction, there is no statute or regulation which grants an employer a two-week grace period from the penalties assessed under section 203 upon the lifting of the injunction. DLSE's stated policy, which would establish such a grace period, is clearly regulatory.

Part Number Six

Part number six pertains to the acceptability of "use it or lose it" provisions in employment agreements. DLSE restates existing law by declaring that "use it or lose it" provisions which result in a forfeiture of already vested or accrued vacation pay will not be recognized. In subpart (a), however, DLSE goes on to declare that a variant of a "use it or lose it" policy would be deemed acceptable if it merely puts a ceiling on the amount of vacation time or vacation pay that can accrue without being taken. Subpart (a) is regulatory.

Part Number Seven

Part number seven provides examples of vacation policies which would be deemed acceptable by the Labor Commissioner in light of Suastez. The court in that case stated:

> "A careful reading of [section 227.3] . . . indicates that the passage ['in accordance with such contract of employment or employer policy respecting eligibility or time served'] . . . means that the amount of vacation pay an employee is entitled to be paid as wages is to be determined with reference to the employer's policy. The typical vacation policy provides that the amount of vacation time for which an employee is eligible depends on, among other things, the length of employment with the company and the title or position the employee holds. The Legislature has left the determination of these variables to the employer or the bargaining table. If the Legislature had intended the contract to control the time of vesting, it could easily have drafted the statute to compel such a result. It did not." [Emphasis in original.]

The examples appear consistent with the holding of Suastez--i.e., not regulatory. The examples do not create new law, they merely illustrate the holding of Suastez.

Part Number Eight

Part number eight provides that "paid days off" will be treated like vacation according to the principles of Suastez. We note that Suastez addressed the issue of when vacation time vests under Labor Code section 227.3. Neither Suastez nor section 227.3 refer to "paid days off." We are aware of no statute or regulation which equates vacation time with "paid days off." DLSE thus interprets both Suastez and section 227.3 to pertain to "paid days off."

Part Number Nine

Part number nine establishes a procedure for the recoupment of an advance on vacation time. Although the concept of an advancement on vacation time was not discussed in Suastez, it appears to be consistent with the treatment of vacation time as wages. It appears, therefore, that the first three sentences of part nine merely set forth facts and information and are therefore not regulatory. The last sentence of part nine, however, specifically pertains to implementation. That sentence prescribes how recoupment of advanced vacation benefits may be accomplished. Accordingly, it is regulatory.

Part Number Ten

Part number ten provides that employees are entitled to a day-by-day pro rata share of the final rate of pay as of the date of termination of employment.[44] This provision simply reflects the holding of Suastez.

With respect to the numbered parts of IB No. 86-3, we conclude that:

(1) Part number one is not a "regulation."

(2) The last sentence of part number two is a "regulation." The remainder is not.

(3) The first sentence of part number three is not a "regulation." The second sentence is a "regulation."

(4) Part number four is not a "regulation."

(5) Part number five is a "regulation."

(6) Subpart (a) of part number six is a "regulation." The remainder is not.

(7) Part number seven is not a "regulation."

(8) Part number eight is a "regulation."

(9) The last sentence of part number nine is a "regulation." The remainder is not.

(10) Part number ten is not a "regulation."

THIRD, WE INQUIRE WHETHER THE CHALLENGED RULE FALLS WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

Rules concerning certain activities of state agencies--for instance, "internal management"--are not subject to the procedural requirements of the APA.[45] However, none of the recognized exceptions apply to the regulatory provisions of IB No. 86-3.

III. CONCLUSION

For the reasons set forth above, OAL finds that:

(1) rules issued by DLSE are generally required to be adopted pursuant to the APA;

(2) parts numbered five and eight and portions of parts numbered two, three, six and nine of DLSE's IB No. 83-3 fall within the meaning of a "regulation" as defined in Government Code section 11342, subdivision (b);

(3) the remaining portions of DLSE's IB No. 83-3 do not constitute a "regulation" as defined in Government Code section 11342, subdivision (b);

(4) the regulatory provisions of IB No. 86-3 are not exempt from the requirements of the APA; and

(5) therefore, parts numbered five and eight and portions of parts numbered two, three, six and nine of IB No. 86-3 violate Government Code section 11347.5, subdivision (a).

DATE: December 29, 1989

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1. The Request for Determination was filed by N. C. Theel, 520 N. Freeman Street, Apartment No. 7, Oceanside, California. The Division of Labor Standards Enforcement was represented by the State Labor Commissioner, Lloyd W. Aubry, Jr., 30 Van Ness Avenue, San Francisco, CA 94102, (415) 557-3827.

   To facilitate the indexing and compilation of determinations, OAL began, as of January 1, 1989, assigning consecutive page numbers to all determinations issued within each calendar year, e.g., the first page of this determination is "605" rather than "1."

2. The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; typewritten version, notes pp. 1-4.

   In August 1989, a second survey of governing case law was published in 1989 OAL Determination No. 13 (Department of Rehabilitation, August 30, 1989, Docket No. 88-019), California Regulatory Notice Register 89, No. 37-Z, p. 2833, note 2. The second survey included (1) five cases decided after April 1986 and (2) seven pre-1986 cases discovered by OAL after April 1986. Persuasive authority was also provided in the form of nine opinions of the California Attorney General which addressed the question of whether certain material was subject to APA rulemaking requirements.

   Since August 1989, the following authorities have come to light:

   > Los Angeles v. Los Olivas Mobile Home P. (1989) -- Cal.App.3d --, 262 Cal.Rptr. 446, 449, citing Jones v. Tracy School Dist. (1980) 27 Cal.3d 99, 165 Cal.Rptr. 100 (a case in which an internal memorandum of the Department of Industrial Relations became involved) the Second District Court of Appeal refused to defer to the administrative interpretation of a rent stabilization ordinance by the city agency charged with its enforcement because the interpretation occurred in an internal memorandum rather than in an administrative regulation adopted after notice and hearing.

   Readers aware of additional judicial decisions concerning "underground regulations"--published or unpublished--are invited to furnish OAL's Regulatory Determinations Unit with a citation to the opinion and, if unpublished, a copy of the opinion. (Whenever a case is cited in a regulatory determination, the citation is reflected in the

Determinations Index.) Readers are also encouraged to submit citations to Attorney General opinions addressing APA compliance issues.

3. Government Code section 19572 provides:

"Each of the following constitutes cause for discipline of [a state] employee:

". . . .

"Unlawful retaliation against any other state officer or employee or member of the public who in good faith reports, discloses, divulges, or otherwise brings to the attention of, the Attorney General, or any other appropriate authority, any facts or information relative to actual or suspected violation of the law of this state or the United States occurring on the job or directly related thereto." [Emphasis added.]

4. Title 1, California Code of Regulations ("CCR") (formerly known as California Administrative Code), section 121, subsection (a), provides:

"'Determination' means a finding by [OAL] as to whether a state agency rule is a regulation, as defined in Government Code section 11342, subdivision (b), which is invalid and unenforceable unless it has been adopted as a regulation and filed with the Secretary of State in accordance with the [APA] or unless it has been exempted by statute from the requirements of the [APA]." [Emphasis added.]

See Planned Parenthood Affiliates of California v. Swoap (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b), yet had not been adopted pursuant to the APA, was "invalid").

5. (1982) 31 Cal.3d 774, 183 Cal.Rptr. 846.

6. Government Code section 11347.5 provides:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as

defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

"(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a [']regulation['] as defined in subdivision (b) of Section 11342.

"(c) The office shall do all of the following:

1. File its determination upon issuance with the Secretary of State.

2. Make its determination known to the agency, the Governor, and the Legislature.

3. Publish a summary of its determination in the California Regulatory Notice Register within 15 days of the date of issuance.

4. Make its determination available to the public and the courts.

"(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.

"(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:

1. The court or administrative agency pro-

ceeding involves the party that sought the determination from the office.

2. The proceeding began prior to the party's request for the office's determination.

3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a [']regulation[*] as defined in subdivision (b) of Section 11342."

[Emphasis added.]

7. As we have indicated elsewhere, an OAL determination pursuant to Government Code section 11347.5 is entitled to great weight in both judicial and adjudicatory administrative proceedings. See 1986 OAL Determination No. 3 (Board of Equalization, May 28, 1986, Docket No. 85-004), California Administrative Notice Register 86, No. 24-Z, June 13, 1986, p. B-22; typewritten version, pp. 7-8; Culligan Water Conditioning of Bellflower, Inc. v. State Board of Equalization (1976) 17 Cal.3d 86, 94, 130 Cal.Rptr. 321, 324-325 (interpretation of statute by agency charged with its enforcement is entitled to great weight). The Legislature's special concern that OAL determinations be given appropriate weight in other proceedings is evidenced by the directive contained in Government Code section 11347.5, subdivision (c): "The office shall . . . [m]ake its determination available to . . . the courts." (Emphasis added.)

8. Note Concerning Comments and Responses

In general, in order to obtain full presentation of contrasting viewpoints, we encourage not only affected rulemaking agencies but also all interested parties to submit written comments on pending requests for regulatory determination. (See Title 1, CCR, sections 124 and 125.) The comment submitted by the affected agency is referred to as the "Response." If the affected agency concludes that part or all of the challenged rule is in fact an "underground regulation," it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

DLSE's Response to the Request for Determination was timely received by OAL on October 19, 1989 and was considered in rendering this determination.

9. If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" (Government Code section 11347.5, subd. (b)) or by incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.)

10. Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on the first page of this Determination.

11. We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.

    The rulemaking portion of the APA and all OAL Title 1 regulations are both reprinted and indexed in the annual APA/OAL regulations booklet, which is available from OAL's Information Services Unit for $3.00.

12. Statutes 1976, chapter 746, sections 16 and 17.

13. Labor Code sections 21; 79; 82, subdivision (b); and 83, subdivision (b).

14. Labor Code section 61.

15. Labor Code section 96.

16. We discuss the affected agency's rulemaking authority (see Gov. Code, sec. 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in

light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. (Only persons who have formally requested notice of proposed regulatory actions from a specific rulemaking agency will be mailed copies of that specific agency's rulemaking notices.) Such public comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

17. Response, p. 2.

18. (1982) 31 Cal.3d 774, 183 Cal.Rptr. 846.

19. Id., at p. 779, 183 Cal.Rptr. at p. 848.

20. Id., at. p. 784, 183 Cal.Rptr. at p. 852.

21. California Hosp. Ass'n v. Henning ("Henning I") (C.D. Cal. 1983) 569 F.Supp. 1544, 1545, 1547.

22. (C.D. Cal. 1983) 569 F.Supp. 1544

23. 29 U.S.C. sections 1001-1461 (1982).

24. Compare the description of the remedy sought by the trade associations in Henning I (C.D. Cal. 1983) 569 F.Supp 1544 with the description in California Hosp. Ass'n v. Henning ("Henning II") (9th Cir. 1985) 770 F.2d. 856.

25. "[The trade associations] based their preemption argument on 29 U.S.C. [section] 1144 which provides that ERISA 'supersede[s] any and all State laws insofar as they may . . . relate to any employee benefit plan.' 'Employee benefit plans' include any 'employee welfare benefit plan,' id. [section] 1002(3), defined as 'any plan, fund, or program . . . established or maintained . . . for the purposed of providing . . . medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits.' Id. [section] 1002(1) (emphasis added)" (Henning II (9th Cir. 1985) 770 F.2d at p. 858.)

26. (9th Cir. 1985) 770 F.2d 856, modified (9th Cir. 1986) 783 F.2d 946, cert. denied, (1986) 477 U.S. 904.

27. (9th Cir. 1986) 783 F.2d 946.

28. Id., at p. 947.

29. U.S. District Court, Central District of California, Civil No. 82 6659 RG (Gx), order filed February 9, 1987.

30. Section 4(b) of ERISA, 29 U.S.C. section 1003(b), states:

> "The provisions of this subchapter [SUBCHAPTER I-PROTECTION OF EMPLOYEE BENEFIT RIGHTS] shall not apply to any employee benefit plan if--
>
> "(1) such plan is a governmental plan . . .;
>
> "(2) such plan is a church plan . . .;
>
> "(3) such plan is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws;
>
> "(4) such plan is maintained outside of the United States primarily for the benefit of persons

substantially all of who are nonresident aliens; or

"(5) such plan is an excess benefit plan . . . and is unfunded."

31. See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 1); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1 and 2); and cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 2 to today's Determination.

32. Government Code section 11342, subdivision (a). See Government Code sections 11343, 11346 and 11347.5. See also Auto and Trailer Parks, 27 Ops.Cal.Atty.Gen. 56, 59 (1956). For a complete discussion of the rationale for the "APA applies to all agencies" principle, see 1989 OAL Determination No. 4 (San Francisco Regional Water Quality Control Board and the State Water Resources Control Board, March 29, 1989, Docket No. 88-006), California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, pp. 1026, 1051-1062; typewritten version, pp. 117-128.

33. See Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747 (unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of APA when engaged in quasi-legislative activities); Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603.

34. 1988 OAL Determination No. 9 (Department of Industrial Relations, June 9, 1988, Docket No. 87-015), CRNR 88, No. 26-Z, June 24, 1988, p. 2160; 1989 OAL Determination No. 17 (Department of Industrial Relations, December 29, 1989, Docket No. 89-005), CRNR 90, No. , January , 1990, p. .

35. Roth v. Department of Veteran Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552.

36. 1986 OAL Determination No. 4 (Board of Equalization, June 25, 1986 Docket No. 85-005), CANR 86, No. 28-Z, July 11, 1986, p. B-7.

37. Code of Civil Procedure section 339.

38. Code of Civil Procedure section 337.

39. Suastez (1982) 31 Cal.3d at pp. 777-778, 183 Cal.Rptr. at p. 848.

40. People v. Guerra (1984) 37 Cal.3d 385, 399, 208 Cal.Rptr. 162, 170, citations omitted.

41. (1984) 153 Cal.App.3d Supp. 1, 200 Cal.Rptr. 418

42. The Labor Commissioner apparently agrees. In Triad Data Services, Inc. v. Jackson (153 Cal.App.3d Supp. at p. 13, 200 Cal.Rptr. at pt. 425.), it was stated:

> "The Division of Labor Standards Enforcement, Department of Industrial Relations of the State of California is charged with the enforcement of section 203 of the Labor Code. Counsel for the division, in an amicus curiae brief filed herein, states the position of the Labor Commissioner to be that 'penalty wages' as provided under the Labor Code are cut off only when such action is filed with a competent court as opposed to an administrative agency."

43. Section 13520 of Title 8 of the California Code of Regulations states in part:

> ". . . a good faith dispute that any wages are due will preclude imposition of the waiting time penalties under Section 203.
>
> "(a) . . . A 'good faith dispute' that any wages are due occurs when an employer presents a defense, based in law or fact which, if successful, would preclude any recovery on the part of the employee. The fact that a defense is ultimately unsuccessful will not preclude a finding that a good faith dispute did exist. . .." [Emphasis added.]

It is possible to argue that part number five of IB No. 86-3, in effect, declares that the imposition of an injunction against DLSE from processing vacation pay claims under Labor Code section 227.3 automatically constitutes a "good faith dispute" under regulation section 13520, thus avoiding the imposition of penalties under Labor Code section 203. While we do not dismiss the possibility of such an interpretation,

it is certainly not the only possible interpretation of the regulation.

One could certainly argue that the imposition of an injunction against DLSE is not a defense, which if successful, would preclude recovery from the employee. The injunction was based on a jurisdictional dispute--i.e., whether Labor Code section 227.3 and Suastez were preempted by ERISA. There was no indication of any defense asserted which would have precluded recovery by employees (whether the claim was processed by DLSE or under ERISA).

We further note that in issuing the injunction, the court's finding that Labor Code section 227.3 is inapplicable does not necessarily mean that Labor Code section 203 does not apply. Sections 203 and 227.3 do not refer to each other.

44. "Courts in other jurisdictions which have considered whether discharged or striking employees have a 'vested' right to a pro rata share of vacation pay have uniformly held that the right vests as services are rendered. 'It is beyond dispute that an agreement to pay vacation pay to employees made to them before they performed their services, and based upon length of service and time worked, is not a gratuity but is a form of compensation for services, and when the services are rendered, the right to secure the promised compensation is vested as much as the right to receive wages or other form of compensation." (Suastez (1982) 31 Cal.3d at p. 781, 183 Cal.Rptr. at p. 850.)

45. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:

    a. Rules relating only to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (b).)

    b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (b).)

    c. Rules that "[establish] or [fix] rates, prices, or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)

    d. Rules directed to a specifically named person or group of persons and which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)

e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)

f. There is limited authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see International Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable).

The above is not intended as an exhaustive list of possible APA exceptions. Further information concerning general APA exceptions is contained in a number of previously issued OAL determinations. The quarterly Index of OAL Regulatory Determinations is a helpful guide for locating such information. (See "Administrative Procedure Act" entry, "Exceptions to APA requirements" subheading.)

The Determinations Index, as well as an order form for purchasing copies of individual determinations, is available from OAL (Attn: Tande' Montez), 555 Capitol Mall, Suite 1290, Sacramento, CA 95814, (916) 323-6225, ATSS 8-473-6225. The price of the latest version of the Index is available upon request. Also, regulatory determinations are published every two weeks in the California Regulatory Notice Register, which is available from OAL at an annual subscription rate of $108.

Though the quarterly Determinations Index is not published in the Notice Register, OAL accepts standing orders for

Index updates. If a standing order is submitted, OAL will periodically mail out Index updates with an invoice.

46. We wish to acknowledge the substantial contribution of Unit Senior Legal Typist Tande' Montez in the processing of this Request and in the preparation of this Determination.